

2828. Alleged misbranding of liquid smoke. U. S. v. E. H. Wright, et al. Demurrer to evidence sustained by the court. (F. & D. No. 3410. I. S. No. 14939-c.)

On February 10, 1913, the United States Attorney for the Western District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against E. H. Wright, George D. Wright, and T. W. Buckner, partners doing business under the firm name and style of E. H. Wright Co., Ltd., Kansas City, Mo., alleging shipment by said defendants in violation of the Food and Drugs Act, on or about February 2, 1911, from the State of Missouri into the State of Indiana, of a quantity of so-called "Wright's Condensed Smoke" which was alleged to have been misbranded. The product was labeled: "Wright's Condensed Smoke A Liquid Smoke made by distilling wood for smoking all kinds of meats. No. 541. Guaranteed by E. H. Wright Co. under the Food and Drugs Act, June 30, 1906. It will preserve the meat for any length of time, keeping it solid and sweet and free from mold, skippers, flies and all other insects. It imparts a true Hickory Smoke flavor to meats, that can be obtained in no other way, making the meat perfectly wholesome and palatable. One bottle will smoke 250 to 300 pounds of meat. Price 75 cts. per Bottle. Every bottle guaranteed to be perfectly satisfactory or money refunded. Get the genuine Wright's Condensed Smoke Manufactured only by The E. H. Wright Co. Limited, Kansas City, Mo."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed that the sample had the general appearance, color, odor, and behavior on distillation of crude pyroligneous acid; that it contained methyl alcohol or a volatile methyl ester, calculated as methyl alcohol, approximately two-thirds gram per 100 cc. Misbranding of the product was alleged in the information for the reason that the label upon each of the bottles containing the product, wherein it was stated that the product was a liquid smoke made by distilling wood for smoking all kinds of meats, was false and misleading in that the product was not a condensed liquid smoke as stated on the labels, but, in truth and in fact, was crude pyroligneous acid. Misbranding was alleged for the further reason that the labels upon the bottles, wherein it was stated that the product was a liquid smoke made by distilling wood for smoking all kinds of meats, deceived and misled the purchaser into the belief that the product was a liquid smoke made by distilling the wood for smoking all kinds of meats, whereas, in truth and in fact, it was not a liquid smoke but a crude pyroligneous acid.

On May 5, 1913, the case having come on for trial before the court and a jury, the defendants entered pleas of not guilty, and at the close of the Government's case after argument of a demurrer interposed by defendants, the said demurrer to the evidence was sustained, as will more fully appear from the following opinion by the court:

VAN VALKENBURG, *Judge*. I have been following this very closely and I have read all of the citations suggested that I was not already familiar with. Now, I think this label itself, within the spirit and purview of this act, reads the Government out of court, and that, combined with what has been added in the way of testimony, but emphasizes that conclusion.

In the first place, it is clearly established from the Government's standpoint that there is no such thing as a condensed smoke, or liquid smoke; there is nothing but smoke, which can not be reduced to any such form as is stated here. Secondly, the defendant in this case has not been putting off his article as and for some other recognized article of commerce. If he has been representing that he has a thing here that will do what some other thing will do, that is an entirely different consideration; whether it will or not, we do not know, at least we do not know in this case, and that is immaterial to this particular form of charge. It is not charged that there is being perpetrated a cheat or fraud in the sense that he is putting off a worthless article or deleterious article, but simply that he is putting off on the public an article which is represented to be a specific article of commerce, which it is not. Smoke is not an article of commerce in the sense we are speaking of here, a commodity that can be bottled and confined and sent off as you can do with this product; but anyway, "Wright's Condensed Smoke, Liquid Smoke," now what is it? Why, it is made by distilling wood

for smoking all kinds of meats, and that is exactly what this stuff is, according to the evidence. Of course, you say this is not smoke, because smoke is not made by distillation, it is made by imperfect combustion; but this, on the face of it, is not something that would mislead the public into believing that it was identical with smoke. There is no one in the world, whether he be a technical man or a layman, who would be deceived into thinking this is smoke that goes up the chimney; everybody knows it is not that. They are addressing themselves to a specific commercial object, and that is the curing of meat, and they represent here that this is a liquid which is made from distilling wood, which, as you might say, is a fanciful or descriptive name referring to the object.

They use that term in a way no one can misunderstand. They use the technical term of "smoking" meat, and they tell you how to pour it over the meat, and by that means cure it, in a way that does not deceive anybody; they know it is a liquid. Now, whether its effects are deleterious, we do not know, and that has nothing to do with the question. Everybody who buys it knows that it is a liquid he is getting, and that there is no such thing as smoke in a liquid or condensed form which can be put up in bottles or cartons and carried around. The label goes on to say that it will preserve meat and impart a true hickory smoke flavor to the meat, and everything you get from this label merely goes to the effect that they have produced a liquid in a specified way, which is true.

The Government, in trying to show that this is not smoke produced by combustion, has shown that it is produced in exactly the same kind of way that is stated on that label. The fact is that they have produced something here which they say has something of the flavor and properties similar to the curative properties of smoke; they get it out of wood and they get it by distillation, and it turns out to be a substance like, if not exactly identical with, pyroligneous acid. Well, nobody could be deceived into thinking it was specifically what the indictment charges they are being deceived with. It is a thing which is produced in such a manner from the art and methods employed in it, that the application of the term "smoke" to it seems to me to be apt or applicable instead of deceptive, and it does not deceive in the sense this statute implies.

No one can be more in sympathy and harmony with the Food and Drug Act than I am, and for that reason I deprecate any effort to place a strained or unreasonable construction upon its terms, which can not help but bring it into disrepute and disrespect with the public. I am not saying this in criticism of the Department or of the district attorney. No doubt there is a point of view that perhaps can be taken in the sense in which this prosecution is leveled, but in its practical application, which is the application the courts in their last analysis must place upon it, it is not a prosecution which aims at the particular thing that this law, at least as construed, was aimed to affect in the sale of drugs and food.

The Supreme Court in the Johnson Remedy case says that the law can not be extended to include mere misrepresentations, or rather a mere question of whether the label properly indicates the effectiveness of the article. And in the Bleached Flour case, the court said that it could not be extended to include adulterations only to such an extent that there was enough to be clearly provable as deleterious to health. Those two features have been eliminated from this act, and if they are to be restored, or either of them, it rests with Congress, and the courts can not get around those points and extend the operative effect of this act by interpretations of the branding. If that is the intention of the Department, it must fail so far as this court is concerned. The term "misbranding" will not take the place of adulteration in some respects or of utility or effectiveness in others. It is for Congress to remedy the law if it is defective.

And, furthermore, in cases which are supposed to be cases of misbranding because of producing deception, it must be of such a substantial nature that the court, if it permitted it to go to the jury, and the jury should find a verdict sustaining the charge, could permit such verdict to stand. In this case I do not feel that I could do so and the demurrer to the evidence is sustained.

B. T. GALLOWAY, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *February 9, 1914.*

2829. Adulteration and misbranding of lemon flavor. U. S. v. Interstate Commerce Co. Plea of guilty. Fine, \$25 and costs. (F. & D. No. 3448. I. S. No. 19484-c.)

On March 8, 1912, the United States Attorney for the Eastern District of Virginia, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Interstate Commerce Co., a corporation, Richmond, Va., alleging shipment by said company, in violation of the